Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

In the Matter of	:	
1989 SATELLITE CARRIER ROYALTY DISTRIBUTION PROCEEDING	:	Docket No. 91-1-89SCD

REPLY COMMENTS OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

The American Society of Composers, Authors and Publishers submits these reply comments pursuant to the Copyright Royalty Tribunal's Notice of Declaratory Ruling Request of January 24, 1991, 56 Fed. Reg. 2,757, and in response to the comments of the Joint Networks, dated February 22, 1991, and of Major League Baseball, dated February 25, 1991 (as supported by the comments of the National Collegiate Athletic Association of February 25, 1991), as follows:

A. The Satellite Carrier Compulsory License Does Not Provide for Payment of Royalties to Copyright Owners of Network Programming

The Joint Networks and Major League Baseball argue that the provisions of the satellite carrier compulsory license are unambiguous and require payment of royalties to

the copyright owners of network programs. Comments of Joint Networks at pp. 10-12; Comments of Major League Baseball at pp. 2-7. They are wrong. The statute is not merely ambiguous, but internally contradictory. On the one hand, it speaks of distributions to "all copyright owners"; on the other, it perpetuates the royalty fee differential between independent and network stations. See, Motion of Program Suppliers dated December 28, 1990, at pp. 4-5.

Like the cable compulsory license, the satellite carrier compulsory license provides for payment of compulsory license fees in a 1:4 ratio for carriage of network and independent stations, respectively. The cable compulsory license does so because no fees are paid or royalties distributed for carriage of network programming. The only logical explanation for the identical ratio in the satellite carrier compulsory license is that Congress intended the same result: no royalty distributions are to be made for network programming.[1/]

1/ As Nimmer notes: "The procedure for distributing [satellite carrier] royalty fees 'parallels the distribution procedure under the section 111 cable compulsory license.' [citing H. Rep. No. 100-887(I), 100th Cong., 2d. Sess., 22 (1988)]." Nimmer on Copyright, §8.18[F][3][d], n. 400.

B. United States Adherence to the Berne Convention Does Not Require Royalty Distribution for Network Programming

The Joint Networks argue that a refusal to distribute satellite carrier royalties to copyright owners of network programs "would be completely contrary to the Berne Convention requirement of compensating all authors for secondary transmissions." Comments of Joint Networks at p. 23 (emphasis in original). Again, they are wrong, as shown by the continued existence of the cable compulsory license without amendment after United States adherence to the Berne Convention.

The cable compulsory license, which all agree excludes copyright owners of local and network programs from entitlement to cable royalties, was in effect long before United States adherence to the Berne Convention. It was not changed when the United States joined Berne. To the contrary, despite the exclusion of certain copyright owners from receipt of cable royalties -- in particular, copyright owners of local programs -- the cable compulsory license was expressly found to be compatible with the requirements of Berne. See, Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, reprinted in full in 10 Columbia-VLA Journal of Law & the Arts, No. 4 (Summer 1986) at 519-20.

In addition, there is not one word in the House and Senate Reports on the Berne Convention Implementation Act which makes the slightest reference to any incompatibility between the cable compulsory license and the Berne Convention. Congress evidently accepted the Ad Hoc Committee's conclusion that no incompatibility existed despite the exclusion of certain copyright owners from cable royalty distributions. As the cable compulsory license does not provide for royalty distribution to copyright owners of local or network programming subject to secondary transmission, and is compatible with Berne, it cannot be credibly argued that the satellite carrier compulsory license's exclusion of copyright owners of network programming from royalty distribution is incompatible with Berne.

C. Conclusion

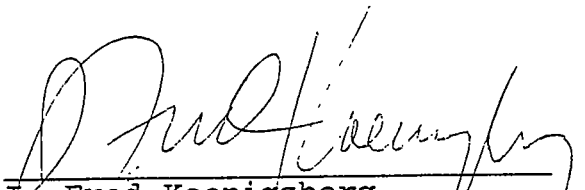
Copyright owners of network programs are not entitled to royalties under 17 U.S.C. §119.

Respectfully submitted

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Bernard Korman
ASCAP
One Lincoln Plaza
New York, NY 10023
(212) 621-6210

Of counsel: Bennett M. Lincoff



I. Fred Koenigsberg
White & Case
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8806

Dated: March 11, 1991

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Comments of the American Society of Composers, Authors and Publishers" was served on the 11th day of March 1991, via first-class mail, postage prepaid, to each of the parties on the attached service list.

Bennett M. Lincoff, Esq.

SERVICE LIST

Laurie Hughes, Esq.
SESAC, Inc.
55 Music Square East
Nashville, TN 37203

Robert Alan Garrett, Esq.
Terri A. Southwick, Esq.
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

Philip R. Hochberg, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 700
Washington, D.C. 20036-3355

Charles T. Duncan, Esq.
Michael W. Faber, Esq.
Joseph J. DiMona, Esq.
Reid & Priest
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Sam Antar, Esq.
Vice President, Law & Regulation
Kristin C. Gerlach, Esq.
Senior General Attorney,
Law & Regulation
Capital Cities/ABC, Inc.
77 West 66th Street
New York, N.Y. 10023

George Vradenburg III, Esq.
Senior Vice President,
General Counsel & Secretary
Sanford I. Kryle, Esq.
General Attorney
CBS Inc.
51 West 52nd Street
New York, N.Y. 10019

Ellen Shaw Agress, Esq.
Vice President
Legal Policy & Planning
Julie Sullivan, Esq.
Assistant General Attorney
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, N.Y. 10112

Brenda L. Fox, Esq.
Seth A. Davidson, Esq.
National Cable Television
Association, Inc.
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

Thomas P. Olson, Esq.
Wilmer Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

John I. Stewart, Jr., Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Judith Jurin Semo, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044

Arthur Scheiner, Esq.
Dennis Lane, Esq.
Holland & Knight
888 17th Street, N.W.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Motion for Acceptance of Late-Filed Pleading" was served on the 12th day of March 1991, via first-class mail, postage prepaid, to each of the parties on the attached service list.

T. Fred Koenigsberg, Esq.

SERVICE LIST

Laurie Hughes, Esq.
SESAC, Inc.
55 Music Square East
Nashville, TN 37203

Robert Alan Garrett, Esq.
Terri A. Southwick, Esq.
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

Philip R. Hochberg, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 700
Washington, D.C. 20036-3355

Charles T. Duncan, Esq.
Michael W. Faber, Esq.
Joseph J. DiMona, Esq.
Reid & Priest
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Sam Antar, Esq.
Vice President, Law & Regulation
Kristin C. Gerlach, Esq.
Senior General Attorney,
Law & Regulation
Capital Cities/ABC, Inc.
77 West 66th Street
New York, N.Y. 10023

George Vradenburg III, Esq.
Senior Vice President,
General Counsel & Secretary
Sanford I. Kryle, Esq.
General Attorney
CBS Inc.
51 West 52nd Street
New York, N.Y. 10019

Ellen Shaw Agress, Esq.
Vice President
Legal Policy & Planning
Julie Sullivan, Esq.
Assistant General Attorney
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, N.Y. 10112

Brenda L. Fox, Esq.
Seth A. Davidson, Esq.
National Cable Television
Association, Inc.
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036

Thomas P. Olson, Esq.
Wilmer Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

John I. Stewart, Jr., Esq.
Crowell & Moring
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Judith Jurin Semo, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044

Arthur Scheiner, Esq.
Dennis Lane, Esq.
Holland & Knight
888 17th Street, N.W.
Washington, D.C. 20006